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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

SCOTT MANATT, INDIVIDUALLY AND AS FATHER OF SCOTT MANATT, JR., NOW DECEASED, AND SEPARATELY IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MANATT, JR., NOW DECEASED; SHARON MANATT, INDIVIDUALLY AND AS MOTHER OF SCOTT MANATT, JR., NOW DECEASED; MITZI MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED; YVETTE MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED

PETITIONERS

V.

UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; AND NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK, A CORPORATION CREATED AND DOING BUSINESS UNDER THE RAIL PASSENGER SERVICE ACT OF 1970; AND B. D. WILDER, AS ENGINEER AND AGENT OF NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. DID THE COURTS BELOW IMPROPERLY APPLY THE FEDERAL RULES OF CIVIL PROCEDURE IN DENYING APPELLANTS MANATTS' MOTION TO TREAT A REQUEST FOR ADMISSIONS TO AMTRAK SERVED WITH THE COMPLAINT ON OCTOBER 16, 1995, NEITHER ADMITTED NOR DENIED WITHIN MORE THAN 140 DAYS AFTER SERVICE OF SAID REQUEST WHICH APPLICATION OF FEDERAL RULES OF CIVIL PROCEDURE RULE 36 HAS BEEN RULED DIFFERENTLY IN THE VARIOUS DISTRICT AND APPELLATE COURTS THROUGHOUT THE NATION?

II. WHETHER THE LOWER COURT ERRED IN FAILING TO GIVE REQUESTED JURY INSTRUCTIONS, ONE OF WHICH WAS THE INSTRUCTION OF AN ABNORMALLY DANGEROUS RAIL CROSSING, TO THE JURY AS REQUESTED BY APPELLANTS (AND OTHER INSTRUCTION #7 AS TO DECEDENT'S RIGHT TO BE ON PUBLIC CROSSING) AS REQUESTED AND CONVERTING THE ISSUES FROM ONE OF FACT TO ONE OF LAW.

III. WHETHER OR NOT THE LOWER COURT ERRED IN DENYING THE MANATT MOTION IN LIMINE AS FILED BY MANATTS AND FAILING TO EXCLUDE INFLAMMATORY AND HIGHLY PREJUDICIAL AND IRRELEVANT TESTIMONY AS TO PRIOR "ALLEGED ACTS" AND CONDUCT OF THE VICTIM, DECEDENT IN ITS APPLICATION AND TREATMENT OF FEDERAL RULES OF EVIDENCE RULES 402, 403 AND 404

RESULTING IN A DENIAL OF THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE 14TH AMENDMENT AND PREJUDICE THE JURY.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in the style of the case.

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SCOTT MANATT, INDIVIDUALLY AND AS FATHER OF SCOTT MANATT, JR., NOW DECEASED, AND SEPARATELY IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MANATT, JR., NOW DECEASED; SHARON MANATT, INDIVIDUALLY AND AS MOTHER OF SCOTT MANATT, JR., NOW DECEASED; MITZI MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED; YVETTE MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED

. Petitioners

v.

UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; AND NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK, A CORPORATION CREATED AND DOING BUSINESS UNDER THE RAIL PASSENGER SERVICE ACT OF 1970; AND B. D. WILDER, AS ENGINEER AND AGENT OF NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as Scott Manatt, Sr., Individually and as Father of Scott Manatt, Jr., Now Deceased, in His Capacity as Personal Representative of the Estate of Scott Manatt, Jr., et al. v. Union Pacific Railroad Company, a Foreign Corporation, and National Railroad Passenger Corporation, a/k/a Amtrak et al., filed August 5, 1997. It is reprinted at Appendix p. 1 and is reported at 122 F.3d 514 (1997).

The Eighth Circuit affirmed the ruling of the United States District Court for the Eastern District of Arkansas, filed September 23, 1996 (Appendix p. 10), an order denying a new trial (Appendix p. 11), and order denying limine (Appendix p. 12) and which is reported as *Manatt et al. v. Union Pacific Railroad Company, a Foreign Corporation, and National Railroad Passenger Corporation a/k/a Amtrak et al.* Reprinted in the appendix. Petition for reconsideration with suggestion en banc was denied September 4, 1997. (Appendix p. 9).

JURISDICTION

This Court has jurisdiction and jurisdiction should be invoked under the provisions of Rule 10.1(a) and Rule 10.1(c) in that the Eighth United States Court of Appeals now being appealed has decided a federal question in a way that is so far departed from the accepted and usual course of

departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically by judicial decision, the Eighth Circuit has now abrogated and rewritten Federal Rules of Civil Procedure Rule 36 and the Federal Rules of Evidence Rules 402, 403 and 404 in that the Eighth Circuit has now ruled that failing to admit or deny request for admissions of fact within 143 days and 35 days after a properly filed motion to deem the request admitted is subject to the trial court's discretion, which is inconsistent with the Eighth Circuit's own ruling in the case of Silverstein v. IRS. This results in a dichotomy in favor of power and the government and is inconsistent with rulings in other courts of appeals as cited, including the Fifth Circuit, the Sixth Circuit, the Ninth Circuit and various district courts of the United States.

In addition, the court has, as to Rule 10.1(c) applied the rules and decided important questions of application of the Federal Rules of Civil Procedure inconsistently which should be settled by this Court in that the Federal Rules of Civil Procedure as interpreted by the Eighth Circuit now leaves an interpretation of the Rules totally to the discretion of the trial judge and/or personal predilections of the various trial courts and subjects parties to less than the equal protection of the laws. A petition is taken from the entry of a judgment in the United States Eighth Circuit Court of Appeals filed August 5, 1997, now reported in Manatt v. Union Pacific, same being the appeal decision.

Petition for a rehearing with a suggestion of en banc was filed and denied on the 4th day of September 1997, as reported at .

STATUTORY PROVISIONS

Federal Rules of Civil Procedure Rule 36 reads as follows:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. **A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.** An answering party may

not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

Rule 302 reads:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

Federal Rules of Evidence Rule 403 reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence Rule 404(a) reads as follows:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked on the grounds that this case arises under the laws of the United States pursuant to 45 U.S.C. §541 et seq., also under diversity and case and controversy exceeding the jurisdictional limit.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 in that this is a final decision of the Untied States District Court as appealed and the Eighth United States Circuit Court of Appeals.

This case involves the question of a 19-year-old boy, after having his vehicle stuck during the hours of darkness, starting to walk home four miles out of town. That after having walked a mile and a half, he set himself down on the rail at a rural crossing. Petitioner Manatt states that at some point Scott Manatt, Jr.'s foot got caught in the rail crossing, and before he could extricate his foot, he was hit and killed by an Amtrak train. Waiting for the ambulance, the boy, Mark Gearhart, with him, robbed his body of $680.00 and later pleaded guilty to felony theft. The boy with him, Gearhart, testified that they were

drinking alcohol. No alcohol was detected under the forensic toxicology report in evidence among other things accurate nine decimals.

Petitioner states that this cause of action occurred by reason of failure to keep a lookout, abnormally dangerous crossing and negligence on the part of the railroad.

The question for review in this matter is the application of the United States District Court for the Eastern District of Arkansas and the Eighth Circuit Court of Appeals of Federal Rules of Civil Procedure Rule 36. In the case of Silverstein v. IRS, the Eighth Circuit has ruled and applied the Federal Rules of Civil Procedure Rule 36 one way in favor of the government and a different way as to this petitioner Manatt and in favor of the power of the railroads to the detriment of the citizens. Both the Eighth Circuit and the district court have rewritten the Federal Rules of Civil Procedure, Rule 36, or so much of the rule that deems the request for admission admitted and not answered in spite of the plain language of the rule and ruled differently than other courts of appeals of the United States. Other issues are the wrongful denial of requested jury instructions and motion in limine and the court's application of Federal Rules of Evidence Rules 402, 403 and 404.

REASONS FOR GRANTING THE WRIT

Scott Manatt respectfully submits to this Court that Rule 36 of the Federal Rules of Civil Procedure has been erroneously applied, both in the United States District Court for the Eastern District of Arkansas and in the Eighth Circuit Court of Appeals and various other courts of appeals of the nation. In each case, it appears that the courts (ruling differently) have ruled the Federal Rules of Civil Procedure Rule 36 is a simple guide of procedure and not a rule. Specifically, under the Federal Rules of Civil Procedure Rule 36, different requests for admissions were served on the defendant, a multibillion-dollar railroad represented by a million-dollar law firm, and Amtrak and were not responded to for 143 days from date of service which includes an excessive term of 35 days **after Manatt's proper motion** was filed to treat the request as admitted. The request for admissions as served remained unaddressed for 108 days and only after Manatt requested that the request for admissions be deemed admitted did Amtrak take an **additional 35 days for a total of 143 days for any response.** The Federal Rules of Civil Procedure either mean what they say, or they do not. Federal Rules of Civil Procedure are believed to be the "Federal Rules" and not the "Federal Guides."

In the case of *Silverstein v. IRS,* 16 F.3d 858 (1994), the Eighth United States Court of Appeals ruled in favor of the IRS when it was expedient to treat requests as admitted for the purpose of ruling in favor of the Internal Revenue Service and

the United States. The court ruled a different way when it was expedient to protect Amtrak and Union Pacific and/or adverse to the interest of the common citizen in this case, Manatt.

In the case of *Beatty v. United States,* 983 F.2d 908 (1993), case note number 4, the advisory committee notes to Rule 36(b) emphasize that "deemed admissions are to give way in the quest for the truth only in extreme circumstances."

In the case of *FDIC v. Prussia,* 18 F.3d 637 (1994), *Prussia* was a case in which the admissions were sought to be amended. In the Manatt case, now petitioner before this Court, there was no amendment. **There was a total absence of any responses for 143 days.** The request for admissions in Manatt which was not responded to read:

> Request that you admit that the Amtrak engineer saw Scott Manatt, Jr. with his hands on the rail trying to extricate his foot from its entrapped position in the rail immediately prior to impact.

The requested admission and the truth should have been admitted in keeping with Exhibit 18 (Appendix p. 19), in which the engineer made the statement **that the decedent, Scott Manatt, Jr., was on the crossing.** This was the heart and soul of the case and by the court's failure to deem the requested admitted, opened the door to the railroad defense of being able to create an "illusory defense" of an invitee vs. a trespasser. As against

Union Pacific and Amtrak, if Scott Manatt, Jr. was 10 or 15 feet out of the crossing, then the jury would be reasonable in allowing a comparative negligence instruction. On the other hand, if Scott Manatt, Jr. was an invitee within the crossing (which is the current state of the law), the railroads owed a duty of ordinary care to Scott Manatt, Jr., now deceased, and comparative negligence is not an issue. The railroad well and truly knew that Scott Manatt, Jr. had his foot caught in the rail prior to his death and if the rules had been enforced, this fact would have been admitted. The only way for petitioner Manatt to prove this fact would be to **exhume the body of Scott Manatt, Jr. at great expense, obtain a paid expert forensic pathologist at great expense and then pay an expert to testify as to the condition of the leg of Scott Manatt, Jr., which creates an impossible, expensive and mentally abusing matter of proof with undue harm and prejudice** to the requesting petitioner Manatt, all at the expense of the family of the boy killed by Amtrak and Union Pacific, who created a cost-prohibitive condition as a defense to this cause of action. "A blind horse had a right to cross a rural crossing at night with an expectation of safety."

The Federal Rules of Civil Procedure are clear, and Federal Rule 36 reads:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or

as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. **A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.** An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

At no time is it suggested that these rules are guides but that they are rules. It seems as if the rules are now being applied in such a way as to bring about confusion in both the trial courts and the courts of appeal throughout the United

States in that the rules and their use and interpretation are subject to the personal predilections of the trial court, the appellate review court, and the discretion of the court. Rule 36 reads, **"that a request for admission is deemed admitted if it is not answered."** The rule either means what it says, or it means nothing. To exonerate by rule the railroads, Amtrak and the law firm is a manipulation of the rules and denies Manatt redress in the wrongful death of Scott Manatt, Jr. Other federal courts have ruled differently than the Eighth Circuit. In the case of *Nguyen v. C. & A. Corporation*, 44 F.3d 234 (4th Cir. 1995), it was held that the district court did not abuse its discretion in accepting answers to requests for admissions one day after due date, and established a standard that the delay was **minimal** in that there had been a snowstorm on the date the answers were due. In short, it appears the Fourth Circuit has inserted an "act of God" or "unusual casualty" exception to Rule 36. No so in the case of Manatt.

In *Chrapliwy v. Uniroyal, Inc.*, 17 Fed Rules Serv. 2d 719 (1973 DC Ind.), a duty was placed on the party opposing the admission to "show any compelling reason why late responses should be allowed since the prejudice which delay caused the petitioner was apparent." In short, the Indiana district court adopted a "clear and obvious standard of prejudice" in favor of the requesting party **and placed the duties to prove no prejudice** to justify a late filing on the party opposing the admission.

In *Woods v. Robb*, 171 F.2d 539 (1948, 5th Cir.), a case in which the opposition to admission claimed excusable cause by being incapacitated as

a result of an automobile accident. The Fifth Circuit said, **"the illness ceased to be an excuse upon its cessation. . . ."** In this case, there was no illness, there was no intervening casualty, and no other reasons other than the fact that Union Pacific and Amtrak and the law firm just did not answer the request for admissions for the first 108 days, and even after the motion to treat them as admitted, the railroad did not even acknowledge, respond or answer with any pleading for an additional 35 days or 23 days beyond a **fourth 30-day** term for a total of 143 days. This adds an element of flaunting the rules and "bad faith" to the cavalier treatment of the rules by the railroad.

In *Walsh v. Connecticut Mut. L. Ins. Co.*, 26 F.Supp. 566 (1939, DC NY), an older case, the court made an interesting ruling in determining that, "because the Federal Rules of Civil Procedure became effective in September 1938, the drastic remedy of summary judgment should not be imposed for the present **until the members of bar had ample opportunity to familiarize themselves with the rules, where the litigants were acting in good faith and were seeking a construction of the rules."** This petitioner submits that there is now a standard of good faith and very clearly since 1938, or 1970 when the new rules were adopted some 27 years is long enough for the law firms, especially the more prestigious and powerful firms in the nation, to know the Rules of Procedure and **to abide by them.** Petitioner would not have gotten away with not answering had this matter been reversed.

In *Weva Oil Corp. v. Belco Petroleum Corp.* 68 F.R.D. 663 (1975, ND WVA), the court found that

permitting the plaintiff to respond out of time, on the basis of an office procedural error, **would prejudice the defendant by requiring it to prove matters contained in their request for admission.** In *Weva Oil, supra,* the court made a further determination that to grant the relief unsupported by affidavit, deposition or otherwise, in the office of the non-responding party's attorney, would result in **totally nullifying the time requirements set forth in Rule 36(a).** The petitioner respectfully submits that that is the proper state of the laws, although very confusing throughout the rest of the nation as a result of the Eighth Circuit ruling. The *Silverstein* ruling and the dissimilar treatment by other federal appellate courts will continue with no uniform standard, guideline or interpretation, unless and until certiorari is granted by the Supreme Court.

In the case of *United States v. Lake Killarney Apartment, Inc.,* 443 F.2d 1170 (5th Cir., 1971), the court held that it **was not an abuse of discretion** for the district court to allow the United States to file, apparently under Rule 36(a) of the Federal Rules of Civil Procedure, belated answers to requests for admissions. This Fifth Circuit decision and the Eighth Circuit decision of *Silverstein, supra,* and this petition of Manatt are all inconsistent each with the other. Somewhere, there is a rule of law that says we, the people, will have uniformity, equality and fairness.

This honorable Court denied certiorari in *Bowers v. E. J. Ross Mfg. Co.,* 149 F.2d 612, *cert. denied,* 326 U.S. 753, 90 L.Ed. 451, 66 S.Ct. 91 (1945), which was well prior to the current Rules of Federal Procedure as amended, but well estab-

lishes good cause to revisit procedural questions by this current Court.

Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147 (6th Cir.), established yet a different standard "that difficulty or hardship the requesting party may face caused by sudden need to obtain evidence upon withdrawal or amendment of admission was controlling." Here there was no amendment or withdrawal—THERE WAS NO ANSWER!

In this Manatt case, the train engineer, B. D. Wilder, had given a statement (Appendix p. 19) that **Scott Manatt, Jr. was "on the crossing" which is a fact that was denied at trial, knowing full well that it would require an exhumation and examination of the body at great emotional expense and financial expense to the family in that it is to the railroad's best interest that the matter be denied, irrespective of the truth.** The railroad then submitted proof that Manatt was struck by a southbound 265-ton train at 65 m.p.h., 10 to 20 feet south of the road crossing, but his body was at rest only 14 feet from the gravel. (Someone's light is not on!)

The Eighth Circuit in *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 191 F.2d 881, quoted the Arkansas case of *Sartor v. Arkansas Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 727, 88 L.Ed. 967, and qualified admissions where there existed no reasonable basis for dispute as to the facts. This is the "genuine issue" standard of which one does not exist in Manatt when the admission is deemed admitted. The proof should proceed on damages only.

In this case, there was no reasonable basis for dispute as to the fact of location of Scott Manatt, Jr. in view of the report that the train engineer had given to the police officers, at the time of the fatal accident, prior to lawyers and investigators getting involved when the truth and statements started changing!

In the case of *American Automobile Association v. AAA Legal Clinic of Jefferson Crooke,* 930 F.2d 1117, the Fifth Circuit Court of Appeals ruled that, "The fact that the parties found more creditable by the district court may lose suit because of its patent disregard of procedural rules with respect to admissions does not rise to the level of manifest injustice, which might justify withdrawal of admissions." The Fifth Circuit adopted a standard that the party that obtained the admissions must not subsequently be prejudiced in its presentation of its case by the withdrawal or amendment of the admissions. This places the duty on the party opposing the admission to show that no prejudice will occur to the parties requesting the admission and further established a standard "that prejudice to the requesting party may be clear and obvious" and therefore inserts yet another divergent view of "a clear and obvious prejudice standard" under Rule 36.

In this case of Manatt, it wasn't simply a matter of prejudice, it was a total impossibility of proof considering the prior statements of the only witness (Wilder) and could only be proven by the inordinate efforts of exhumation and a forensic pathologist testifying, which costs the family of Scott Manatt, Jr. could not afford. The fifth division in Minnesota in *American Petro, Inc. v. Ed-*

ward C. Schurtleff, 159 F.R.D. 35, established a test for allowing a withdrawal of admissions as being "dependent upon the prejudice to the requesting party." The district court in the Eastern District of Virginia in the case of *Ameribank Savings Banks v. Resolution Trust Corporation,* 858 F.Supp 576, a district court case, ruled when a party seeks leave to file untimely answers, the test to be applied by the court is whether permitting the party to answer will aid in the presentation of the merits of the action and whether prejudice will accrue to the propounding party.

In *American Automobile Association, supra,* the court further stating,

> We recognize the potential harshness of this result. To allow the court to withdraw or ignore admissions sua sponte post-trial would, however, negate the very purpose of Rule 36. Rule 36 allows the parties to narrow the issues to be resolved at trial by identifying and eliminating those matters on which the parties agree.

Petitioner respectfully submits that the statement by the court quoted above is a fair statement of the rules. Rule 36 either says that admissions are admitted or says they shall not be admitted. Specifically, the rule says, **"the matter is admitted unless . . ."** To extend the time to respond, a petition to amend must be timely filed by the railroad which in the Manatt case, nothing was ever filed.

Finally, in the case of *999, a Corporation v. C.I..T. Corporation*, 776 F.2d 866 (1985), the Ninth Circuit Court of Appeals ruled, "Trial courts should be cautious in exercising their discretion to permit withdrawal or amendment of an admission." The Ninth Circuit went further (appropriate in Manatt) by holding, "Evidence inconsistent with an admission is properly excluded." This is not a case of amendment, this is a case of **no answer at all!**

Petitioner respectfully submits that had the proper admission been allowed, then the comparative negligence instruction was improper and other reputation irrelevant testimony would not have been allowed into evidence, nor would the jury, nor the trial court have had an opportunity to attempt to discredit Scott Manatt, Jr. by going into matters under "the guise of comparatively negligent" that occurred two weeks prior to the fatal accident that killed Scott Manatt, Jr. on the railroad while walking! Petitioners respectfully submit that to allow this "witch hunt" circumvented justice and allowed reputation by hearsay after death to be the issue at trial and not the facts themselves and should not have been tolerated. The thief, Mark Gearhart, who pleaded guilty to robbing the body of Scott Manatt, Jr. of $680.00, was allowed to testify as to alcohol (none was detected in the toxicologist report), and events two weeks in advance of Scott Manatt Jr.'s death, alleged "talk about suicide" and drugs **inconsistent with the toxicology report.** This thief was also a target of a murder II inquiry but the district court and the Eighth Circuit allowed these statements of the thief trying to cover himself in spite of a properly and timely filed motion in limine.

This tainted and perjured testimony could not be denied by the deceased Scott Manatt, Jr. as a result of his death. The Eighth Circuit then used Gearhart and his incredulous testimony as a basis for writing the **scathing statement of facts into the official report.** Petitioner Manatt and the family got penalized for taking an appeal now recorded in law books for generations to come quoting those "alleged facts" **smearing forever the name and reputation of Scott Manatt, Jr.** This is abusive to the family and the memory of Scott Manatt, Jr. and is neither accurate nor fair comment as to this record.

Petitioner respectfully submits to this honorable Court that the only thing conclusively established and admitted is the fact that there is no nationwide standard in the application of Rule 36 of the Federal Rules of Civil Procedure, which rule leaves it to the different and varying district and appellate courts of the nation to determine irrespective of the plain language of the rule their individual interpretation of Rule 36. Citizens of the United States and pro se litigants and the poor people of the country are still entitled to as much consideration and equal access to the courts and fundamental fairness as are the powerful railroads, powerful law firms and powerful quasi-federal agencies such as Amtrak in which even the president of the United States stopped a strike. This allows a "protectionist policy" in favor of allowing certain types of cases not to be able to proceed under the same rules as are other cases and clearly subjects the people without access to the powerful money and/or law firms to disparate and unequal position under the law. The Court should grant certiorari to allow fundamental fairness and

to right this injustice. The Eighth Circuit was requested and should have reversed this record and referred the case to the United States Department of Justice for perjury by the thief and murder target (Mark Gearhart).

In this case, Scott Manatt, Jr. is deceased, this case is such that there is no semblance of equal protection of the laws nor due process nor consistency in rulings in the case before the Court. Isn't it enough that Scott Manatt, Jr. waited to die with his foot caught in the rail? Must a "protectionist policy" be created to protect the railroad at the expense of the memory of Amtrak running down Scott Manatt, Jr. like an animal in a trap? The various states and the United States give Amtrak money, loans and concessions and now protect them against the "undisputed damages" proven in the courts. It's wrong!

This case stands for the clear proposition that if you are big enough, powerful enough and have enough money and can afford the best lawyers in America, that you can get the rulings irrespective of what the Federal Rules of Civil Procedure require or how they read in that they do not apply if you are big enough to even get the president of the United States to stop a strike for you. Where is justice?

An individual representing a family pro se is entitled to the same protection and the same treatment under the rules. Never have the rules been so flagrantly ignored as was in this case, now sought for appeal as is set forth in the other points herein. Jurists and courts are clever in the way

rules and rulings are made. The law was never intended for the clever but rather justice for all Americans.

Manatt respectfully submits that all of the proof as submitted was undisputed on the question of abnormally dangerous rail crossing, and the court's ruling is inconsistent with the courts of the State of Arkansas and *Lusby v. Union Pacific Railroad,* 4 F.3d 639, and *Northland Insurance Company v. Union Pacific,* 830 S.W.2d 850, in that the undisputed proof was that the rail crossing in which Scott Manatt, Jr. got his foot caught was four inches wide on one end of an eight-foot crosstie and three inches on the other end, seven to nine inches deep and created a "boot-like vise" which was the physical condition of the rail. The appellate court upheld the district court in holding that the requested jury instruction should not have been given, which instruction of abnormally dangerous crossing is undisputedly a fact question within the State of Arkansas. (See Federal Rules of Evidence 302.) The district court and the Eighth Circuit have now treated that question as "one of law." Irrespective of the proof, the jury never got to hear this case properly which resulted in disparate and unequal treatment of this petitioner and appellant's case from the normal rule of law. Therefore, the superintending control of this Supreme Court of the United States should be exercised. If not you, then who?

In addition, the district court and the Eighth Circuit were in error in failing to grant a motion in limine to exclude inflammatory and highly prejudicial testimony prior to any alleged acts of conduct of the victim decedent and misappre-hended

and misapplied the Federal Rules of Evidence, Rule 402, 403 and 404 in that the district court, now affirmed by the Eighth Circuit, upheld the testimony of prior reputation of the decedent and tried the reputation of Scott Manatt, Jr. prior to the fateful night of his death as testified by a felon (Gearhart). Scott Manatt, Jr., deceased, was entitled to a presumption of not being negligent, but the railroad received a comparative-negligence instruction at the trial. Comparative negligence presupposes that only events that occurred on that fateful night should be considered. **"What Scott Manatt, Jr. did that contributed to his death that he should not have done or what he did not do that he should have done that contributed to his death at the instant of death should have been the only conduct allowed."** There is no proof in this case of any specific act of negligence. This case was tried by innuendo, suggestion and wrongful application of the Federal Rules of Evidence in the face of a timely and properly filed motion in limine and poisoned the minds of the jury and the court by the testimony of a thief and his mother!

In short, this case stands for the simple premise that there is no uniform or standard treatment in applying the equal protection of the laws. There is no equal standard in rulings which are a "resultant dichotomy" in favor of the big and the powerful to the detriment of the private litigants. It also results in an unequal and disproportionate application of Federal Rules of Civil Procedure and as to the larger law firms and big defendants in America to whom they become simple guides that may be complied with or ignored at the personal whims and dictates of the defending

lawyers and law firms and/or defendants. This is inappropriate; this is not within the confines and meaning of the 14th Amendment to the federal Constitution, the Equal Protection of the Laws Clause of same, nor does it accord to this petitioner the rights guaranteed and secured by the federal Constitution. It is absolutely essential and necessary that superintending responsibility of the Court be exercised immediately if for no reason other than to attempt to restore trust and faith in the judicial system.

In addition, the rule now rendered by the Eighth Circuit Court of Appeals has altered Rule 36 of the Federal Rules of Civil Procedure, altered its meaning, changed the rule, eliminated that part of the rule that says that the request is deemed admitted, and further expanded the rules of evidence far beyond the scope of uniformity within the continental United States by judicially rewriting the Federal Rules of Civil Procedure and Federal Rules of Evidence on a unilateral basis.

Petitioner now respectfully submits that, with the Supreme Court's caseload, this case may be summarily set aside without exercising the superintending power of the Court. Petitioner respectfully submits that this would be error in the thinking of the Court, and as the chief justice once reminded the world when he said, **"We are not infallible because we are right; we are infallible because we are last."** If you leave this door open, then a miscarriage of justice has occurred, the Federal Rules of Civil Procedure have been abrogated, amended and rewritten, and the Federal Rules of Evidence will cease to exist and mean nothing and will precipitate a resultant dichotomy

in the law, subject only to the power of big money and those that are able to brief cases more adequately than persons of less resources. This is wrong. It is not fair. It's an injustice, and if certiorari is denied, **it becomes the law of the United States.** What can I say to get you to listen?

Respectfully submitted,
SCOTT MANATT, #70044
P. O. Box 473
Corning, Arkansas 72422
(870) 857-3163
Petitioner and Counsel of Record

Appendix

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3934

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

SCOTT MANATT, JR., NOW DECEASED, AND SEPARATELY IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MANATT, JR., NOW DECEASED; SHARON MANATT, INDIVIDUALLY AND AS MOTHER OF SCOTT MANATT, JR., NOW DECEASED; MITZI MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED; YVETTE MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED

Petitioners

v.

UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; AND NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK, A CORPORATION CREATED AND DOING BUSINESS UNDER THE RAIL PASSENGER SERVICE ACT OF 1970; AND B. D. WILDER, AS ENGINEER AND AGENT OF NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK

Respondents

No. 96-3934

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: June 11, 1997
Filed: August 5, 1997

Before WOLLMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and BEEZER, Senior Circuit Judge[1]

HENLEY, Senior Circuit Judge.

On October 5, 1993, at about 4:30 a.m., nineteen-year-old Scott Manatt, Jr. (Scott) was killed when he was hit by an Amtrak train while he was on railroad tracks near a crossing in Corning, Arkansas. His father, Scott Manatt, Sr., and other family members (collectively referred to as Manatts) appeal from a judgment of the district court[2] entered on a jury verdict in their wrongful death action in favor of Amtrak and Union Pacific Railroad Company (UP), the lessor of the railroad tracks. We affirm.

The evidence viewed in a light most favorable to the jury's verdict reveals the following: Around 9:00 or 10:00 p.m. on the night before the accident, Scott and Angel Lane went to Mark Gearhart's house. According to Gearhart, Scott had been taking drugs and had been depressed for about two weeks and was "messed up pretty good" that evening. Nonetheless, Gearhart and his wife rode around town with Scott and Angel. During the evening, Scott drank two or three beers and took some pills. In the early morning hours, the car veered off the road and got stuck in a ditch about a mile from a rail crossing. The women went for help, but Scott and Mark decided to walk down

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[1] The Honorable Robert R. Beezer, United States Senior Circuit Judge for the Ninth Circuit, sitting by designation.

[2] The Honorable James Moody, United States District Judge for the Eastern District of Arkansas.

the tracks to the crossing. As they walked, Scott talked about committing suicide. Scott then sat on the side of the tracks and covered himself with a sheet. Gearhart saw a train coming and told Scott to get up. Gearhart walked off the tracks, but Scott continued sitting on the side of the tracks. As the train approached, the train's engineer, B. D. Wilder, saw what appeared to be a plastic or paper wrapping on the tracks, which was about ten to twenty feet south of the crossing. When Wilder got closer, he saw a hand reach out from underneath the wrapping and immediately put on the emergency brake, but it was too late. As Gearhart looked back, he saw the train hit Scott. An autopsy toxicology report indicated that Scott had taken Valium and methamphetamine, which, in the opinion of a toxicologist, would have impaired a person's ability to recognize and avoid danger.

In support of the wrongful death action, Manatt, Sr. testified that a week after the accident, he went to the rail crossing and found a gap between the crosstie and the rail. Because Scott's pant leg had a creosote mark on it and his leg had been broken, Manatt believed that Scott's foot must have gotten caught in the gap, thus preventing escape from the oncoming train. Two other witnesses testified about the gap. Ben Williams, owner of the land at the crossing and a friend of the Manatt family, testified that Manatt, Sr. had taken him to the crossing several times and that his foot had gotten caught in a gap between the crosstie and the rail. Richard Emert, manager of a funeral home and deputy coroner, testified that in October or November of 1993 he went to the crossing and his foot also got caught in a gap. Be-

cause of the mark on the pants, the broken leg and the location of the body after the accident, Emert agreed with Manatt that Scott's foot must have gotten caught in the gap. On cross-examination, Emert stated that except for a six-hour seminar, he had no education, training or experience in accident reconstruction, that the state police had investigated the accident, that this was the first time he had investigated an accident scene in connection with a civil suit, and that he had not consulted any written material or physicians in arriving at his conclusion. Emert also stated that he was unaware of the size or type of Scott's shoes, but was aware that both of Scott's shoes were on his feet after the accident and there was no trauma to the ankles. In addition, Dr. Michael Lack, Scott's physician, testified that the toxicology report indicated that Scott had taken certain drugs, but believed that the drugs could have been prescription drugs, such as pain or cold medications. Dr. Lack testified it was difficult to determine whether the drugs had impaired Scott's mental status.

On appeal, the Manatts first argue that the district court erred in denying their motion to treat a request for admission as admitted before Amtrak filed its answer beyond the thirty days provided by Fed. R. Civ. P. 36(a). The request read as follows: "The Amtrak engineer saw Scott Manatt, Jr. with his hands on the rail trying to extricate his foot from its entrapped position with the rail immediately prior to impact." They are correct in asserting that Rule 36(a) provides that "each matter requested is deemed admitted unless the responding party serves a written answer or objection within 30 days." *Gutting v. Falstaff Brewing Corp.*, 710

F.2d 1309, 1312 (8th Cir. 1983). However, "[b]ecause the district court has the power to allow a longer time, . . . the court, in its discretion, may permit the filing of an answer that would be otherwise untimely." *Id.* Therefore, contrary to their argument, "the failure to respond in a timely fashion does not require the court automatically to deem all matters admitted." *Id.*

In reviewing for an abuse of discretion, we consider "the effect upon the litigation and prejudice to the resisting party." *Federal Deposit Ins. Corp. v. Prusia,* 18 F.3d 637, 640 (8th Cir. 1994) (internal quotation omitted). Here, the district court did not abuse its discretion Refusing the late answer would not have "subserved the presentation of the merits" of Amtrak's defense. *Cf. id.* (amendment of admission permitted "[b]ecause allowing the erroneous admission to stand might have barred [] claim"). In the circumstances of this case, "[t]he prospect of deeming [the] controverted fact[] . . . as having been admitted seems . . . to be anathema to the ascertainment of the truth." *White Consol. Indus., Inc. v. Waterhouse,* 158 F.R.D. 429, 433 (D. Minn. 1994). In addition, the Manatts have not established prejudice, which in this context means " 'the difficulty a party may face in proving its case because of the sudden need to obtain evidence.' " *Prusia,* 18 F.3d at 640 (quoting *Falstaff,* 710 F.2d at 1314). In fact, they do not even allege prejudice and "[t]he necessity of having to convince the trier of fact of the truth of the matter erroneously admitted is not sufficient." *Id.*

The Manatts also argue that the district court abused its discretion by allowing testimony

concerning Scott's drug use and depression, asserting that the evidence was inadmissible under Fed. R. Evid. 404(b). The rule provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith[,]" but "is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident." Although we believe that the evidence would have been admissible under Rule 404(b), we agree with Amtrak and UP that the court did not admit the evidence under Rule 404(b), but properly admitted it as relevant evidence under Fed. R. Evid. 401 and 402. "[T]he cause of the initial accident [wa]s directly in issue, and the extent of [Scott's impairment] is evidence that clearly bears on the accident's cause." *Swajian v. General Motors Corp.*, 916 F.2d 31, 35 (1st Cir. 1990).

The Manatts go on to argue that even if the evidence was admissible under Rules 401, 402 or 404(b), the district court should have excluded it under Fed. R. Evid. 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Their argument is without merit. Although the evidence of Scott's drug use and suicidal thoughts "was no doubt prejudicial," it is well settled that "Rule 403 is concerned only with 'unfair prejudice,' that is, 'an undue tendency to suggest decision on an improper basis.'" *United States v. Yellow*, 18 F.3d 1438, 1442 (8th Cir. 1994) (quoting Rule 403, Adv. Comm. Note). In this case, the evidence did not " 'divert the jury's attention from the material issues in the trial.' " *Id.* (quoting *United States v. Fawbush*, 900 F.2d 150,

152 (8th Cir. 1990)). Moreover, the district court was careful to confine the testimony to general questions concerning the two weeks preceding the accident. *See id.* Nor, as the Manatts argue, did the district court err in admitting the autopsy blood test results. *See, e.g., McVay v. State,* 847 S.W.2d 28, 32 (Ark. 1993) ("a blood test result [i]s not to be considered a confidential communication").

In addition, the district curt did not err in refusing the Manatts' proffered jury instructions. The court correctly refused to submit an instruction for an abnormally dangerous crossing in that there was no evidence that the crossing was "dangerous because of some physical hazard or visual obstruction" or that the "volume of both train and vehicular traffic render[ed] the [crossing] abnormally dangerous. *Missouri Pacific R.R. Co. v. Biddle,* 732 S.W.2d 473, 475 (Ark.), *modified on other grounds,* 737 S.W.2d 625 (1987); *see also Shibley v. St. Louis-San Francisco Ry.,* 533 F.2d 1057, 1063-64 (8th Cir. 1976). The district court also properly refused to instruct the jury that Scott "had a right to be on a public crossing . . . whatever his purpose." As the court noted, the proposed instruction in effect required the jury to find that Scott was on the crossing, but the evidence was in dispute as to whether he was on the crossing or ten to twenty feet south of the crossing.

The Manatts also argue that the district court erred in denying their motion for a new trial, asserting primarily that the verdict was against the weight of the evidence. "The authority to grant or deny a new trial is a matter within the district

court's discretion and is not to be reversed absent a clear abuse of discretion." *Wood v. Minnesota Mining & Mfg. Co.*, 112 F.3d 306, 311 (8th Cir. 1997). "Where, as here, the 'basis of the motion for a new trial is that the jury's verdict is against the weight of the evidence, the district court's denial of the motion is virtually unassailable on appeal.'" *Id.* (quoting *Keenan v. Computer Assoc. Int'l, Inc.*, 13 F.3d 1266, 1269 (8th Cir. 1994)). Although the Manatts contend that Gearhart was not a credible witness, it was up to the jury to assess his credibility. The jury was fully aware that he had taken drugs the night of the accident and had pleaded no contest to robbing Scott's body after the accident. Indeed, Amtrak and UP told the jury in opening statement that Gearhart was a "distasteful individual." However, Gearhart's "distastefulness" did not make him unworthy of belief. As Amtrak and UP note, among other things, Gearhart's testimony concerning Scott's drug use was corroborated by the toxicology report, and his testimony that Scott was sitting on the tracks covered by a sheet was corroborated by Wilder's testimony.

The Manatts raise various other arguments. We have reviewed them and they are without merit.

Accordingly, we affirm the district court's judgment.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
for the Eighth Circuit

No. 96-393EAJ

Scott Manatt, Sr., etc., et al.,

Appellants

v.

Union Pacific Railroad Company,
etc., et al.,

Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 4, 1997
Order entered at the Direction of the Court
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

In the United States District Court
Eastern District of Arkansas
Jonesboro Division

SCOTT MANATT, SR., Individually, and as Father of Scott Manatt, Jr., Now Deceased, et al.
Plaintiffs

vs. J-C-95-219

UNION PACIFIC RAILROAD COMPANY, A Foreign Corporation, and NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK, et al.
Defendants

Judgment on Jury Verdict

This action came on for trial September 16, 1996, before the Court and a jury, the Honorable James M. Moody, United States District Judge presiding. The issues having been duly tried, and after deliberating thereon, the jury returned a verdict on September 18, 1996, in favor of the defendants.

JUDGMENT is entered for the defendants against the plaintiffs.

IT IS SO ORDERED this 19th day of September, 1996.

JAMES M. MOODY
United States District Judge

In the United States District Court
Eastern District of Arkansas
Jonesboro Division

SCOTT MANATT, INDIVIDUALLY AND AS FATHER OF SCOTT MANATT, JR., NOW DECEASED, AND SEPARATELY IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MANATT, JR., NOW DECEASED; SHARON MANATT, INDIVIDUALLY AND AS MOTHER OF SCOTT MANATT, JR., NOW DECEASED; MITZI MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED; YVETTE MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED

Petitioners

v.

UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; AND NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK, A CORPORATION CREATED AND DOING BUSINESS UNDER THE RAIL PASSENGER SERVICE ACT OF 1970; AND B. D. WILDER, AS ENGINEER AND AGENT OF NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK

Respondents

Order

After review of the motion and response thereto, plaintiff's motion for a new trial is denied. (#60)

IT IS SO ORDERED this 9 day of October, 1996.

JAMES M. MOODY
United States District Judge

In the United States District Court
Eastern District of Arkansas
Jonesboro Division
Order

Plaintiffs have filed a Motion in Limine to prohibit the introduction of certain evidence in a jury trial scheduled for September 16, 1996, at 9:00 a.m. The Court rules as follows: evidence or testimony of the personal church affiliations, beliefs and/or membership affiliations in any civic clubs of J. D. Starr or B. D. Wilder will be excluded pursuant to Federal Rule of Civil Procedure (Rule) 610 and any evidence of life insurance on the life of Scott Manatt, Jr., shall be excluded pursuant to Rule 402.

Evidence of blood tests, or lab results resulting from any investigation by the county coroner of Scott Manatt, Jr.'s death will not be excluded based on privilege or lack of consent pursuant to Rule 501 and Ark. Code Ann. #12-12-315(a)(1)(C).

The Court cannot rule on the remaining requests until it has specific knowledge of the evidence at issue, how such evidence was obtained and how such evidence will be used at trial. These requests will be addressed at the pre-trial conference on September 16, 1996.

IT IS SO ORDERED this 11 day of September, 1996.

JAMES M. MOODY
United States District Judge

In the United States District Court
Eastern District of Arkansas
Jonesboro Division

SCOTT MANATT, INDIVIDUALLY AND AS FATHER OF SCOTT MANATT, JR., NOW DECEASED, AND SEPARATELY IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SCOTT MANATT, JR., NOW DECEASED; SHARON MANATT, INDIVIDUALLY AND AS MOTHER OF SCOTT MANATT, JR., NOW DECEASED; MITZI MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED; YVETEE MANATT, INDIVIDUALLY AND AS SURVIVING SISTER OF SCOTT MANATT, JR., NOW DECEASED Petitioners

v. No. J-C-95-219

UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; AND NATIONAL RAILROAD PASSENGER CORPORATION A/K/A AMTRAK, A CORPORATION CREATED AND DOING BUSINESS UNDER THE RAIL PASSENGER SERVICE ACT OF 1970; AND B. D. WILDER AS ENGINEER AND AGENT OF NATIONAL RAILROAD PASSENGER CORPORATION, A/K/A AMTRAK Respondents

Motion in Limine

Comes the plaintiff, and for this Motion in Limine respectfully moves the Court to enter an Order, (1) excluding from evidence, and (2) prohibiting the witnesses or the attorneys from mentioning any past habit, custom, charge, or conviction of Scott Manatt, Jr., the decedent, and from mentioning or inquiring into any events that occurred hours, days or weeks before the death of

Scott Manatt, Jr. or days, hours or weeks after the death of Scott Manatt, Jr.

2. Further, that the Court should enter an order and prohibit the witnesses or the attorney from mentioning or suggesting to the Court that Scott Manatt, Jr. did not have a legal right to be on a public crossing irrespective of the day or the hour nor in any way to suggest anything improper by reason of being at the crossing at that particular time of night.

3. That the Court should enter an order excluding from evidence and prohibiting the witness or the attorneys from mentioning the facts or allegations or circumstances attendant to a Bronco Automobile that was stuck in a ditch some distance from the fatal crossing, or any alleged facts attendant thereto, or any reference to a gun, drugs, alcohol, stolen property or other reference which could mislead the jury.

4. That the Court should exclude from evidence and prohibit the witnesses or the attorney from mentioning any medical records, blood tests, or lab results of any kind, character or description, taken or allegedly taken of Scott Manatt after his death.

5. The Court should exclude from evidence and prohibit witnesses or the attorney from testifying in violation of any medical privilege, and affirmatively states that the above testimony has nothing to do with the basis of this lawsuit which is (1) negligence of the railroad in construction and maintenance of a crossing, the foot being

caught, (2) outrageous conduct of the railroad together with the allegations of negligence as set forth in plaintiff's complaint all of which events occurred and were in no way related to either the prior histories of Scott Manatt, Jr., nor the vehicle immobilized for whatever reason.

6. The Court should exclude evidence and prohibit any witness or the attorney from testifying as to their personal Church affiliations, beliefs and/or membership affiliations in any civic clubs and particularly prohibiting J. D. Starr or B. D. Wilder, either or both, from testifying or in any way alluding to the presence of God in their emotional dealing and thinking following the death of Scott Manatt, Jr. Further, that B. D. Wilder should not be allowed to testify as to any shed tears or other things designed to show an "after the fact reflective mood" as opposed to what he did on the fateful night of the death of Scott Manatt, Jr.

7. The Court should exclude evidence and prohibit any witness INCLUDING SPECIFICALLY Chuck Malone, Trooper Earnhart and Steve Huddleston or the attorney in testifying, from making reference to various police reports and any "personal" knowledge of the decedent, his habits, prior acts, prior occurrences or opinions and/or decedent's activities both prior to and on the evening of the accident except that which occurred at the fateful crossing and then only based on observations and not on interview or statements of others, specifically prohibiting any reference to hearsay contained in any report compiled or filed and disallowing the "police report" into evidence and particularly quashing that part of the report as to

blood work or alleged blood work and/or reports then attached to the report, all of which would only attempt to inflame the jury and draw on personal prejudices and mislead the jury.

8. The Court should exclude evidence and prohibit any witness including specifically Dr. Mason (a toxicologist) or the attorney from testifying as to various drug levels alleged to be in the decedent's body at the time an alleged blood sample was taken and the "effect" of those drug levels on the decedent as same are both remote and speculative.

9. The after the fact police report should be excluded and the trooper's testimony limited to what he did and when he did it after the accident.

10. The Court should exclude evidence and prohibit any witness including specifically Lee Meyers, Gary Gott and/or Dick Tufts or their attorney or the defendant's attorney from testifying as to any "pertinent information" they obtained as part of their investigation and subsequent contacts and discussions with plaintiff and other investigating authorities. Obviously, the effort will be to gain access to rampant hearsay under the guise of investigation and not the physical observations on the fateful night.

11. The Court should exclude evidence and prohibit any witness including J. D. Starr specifically from testifying as to why J. D. Starr answered questions at his deposition as he did and specifically exclude the modification summary of

J. D. Starr in his Errata sheet attached to his deposition.

12. The Court should exclude evidence and prohibit any witness or the attorney for the railroad from making any reference to any insurance on the life of Scott Manatt, Jr.

WHEREFORE, plaintiff prays that the Court enter a Motion in Limine limiting the testimony of the defendants as set forth, and that a hearing or conference be held in this Motion as to the Court should be appropriate.

Respectfully submitted,
SCOTT MANATT

Plaintiffs' Requested Jury Instruction No. 22

Ladies and gentlemen of the jury. Plaintiff Manatt contends that the railroad crossing in this case was abnormally dangerous, and they have the burden of proving this proposition.

If a railroad grade crossing is frequently used by the traveling public, if trains pass over it frequently, and if the crossing is so dangerous because of surrounding circumstances that a reasonably careful person could not use it with reasonable safety in the absence of special warnings, then it would be an abnormally dangerous crossing. Whether the railroad grade crossing in this case was abnormally dangerous is for you to decide.

If you find that the crossing was abnormally dangerous, as I have defined that term, then it

was the duty of the railroad to use ordinary care to give a warning reasonably sufficient to permit the traveling public to use the crossing with reasonable safety.

AMI 1805 Railroads—Abnormally Dangerous Crossing—Definition—Duty to Warn

Redman v. St. Louis S.W. Ry. Co., 316 Ark. 636 (1994)

Missouri Pac. R.R. v. Biddle, 293 Ark. 142 (1987)

St. Louis Southwestern Rwy Co. v. Evans, 254 Ark. 762 (1973)

St. Louis S.W. Ry. Co. v. Farrell, Adm'x, 242 Ark. 757 (1967)

St. Louis S.W. Ry. Co. v. Jackson, 242 Ark. 858 (1967)

Plaintiffs' Requested Jury Instruction No. 7

Ladies and gentlemen of the jury. You are herewith instructed the plaintiff, Scott Manatt, Jr., now deceased, had a right to be on a public crossing whether for business, pleasure, or caprice and whatever his purpose there he was considered under the law as being rightfully there and the railroad owes him the duty of exercising ordinary care for his safety and is liable for any negligence breach of duty to keep the crossing in good condition for the public if its breach in this respect is the proximate cause of injury.

64 A.L.R.2d 1226

Plaintiff's Exhibit 18

5 Oct 93

At approximately 4:20 a.m. on 5 Oct 93, I was traveling southbound on train #21 engine to Amtk354 when I struck a pedestrian on road crossing located at MP 188.5. I was traveling about 65 mph and was blowing the horn and ringing the bell with my headlight on bright.

There were two people on the crossing one of whom was walking away from the crossing in a westward direction while the victim appeared to have been covered under a sheet of plastic and was in the process of getting up very slowly at the time of impact. The right front of Engine 354 struck the pedestrian and I immediately put the train in emergency.

B. D. WILDER
Engineer Train #21